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In re Patent No. 6,128,607 : OFFICE OF PETITIONS
Nordin et al. :
Issue Date: October 3, 2000 : DECISION ON PETITION
Application No. 08/682,859 :
Filed: July 12, 1996 :
Attorney Docket No. 99-0740 :

This is a decision on the PETITION TO ACCEPT UNAVOIDABLY DELAYED PAYMENT OF MAINTENANCE FEE IN AN EXPIRED PATENT (37 CFR 1.378(b)), " filed December 9, 2008.

The petition under 37 CFR 1.378(b) is DISMISSED.

The patent issued October 3, 2000. The grace period for paying the 3-½ year maintenance fee expired at midnight on October 3, 2004, with no payment received. Moreover, the grace period for paying the 7-½ year maintenance fee expired at midnight on October 3, 2008, with no payment received.

The petition includes payment of the first maintenance fee (\$1305) and the surcharge after expiration of \$700 where late payment is unavoidable. The petition does not include the second maintenance fee despite the fact that as of the date of filing of the petition the window for payment of the 7 ½ maintenance fee had closed. Moreover, the record has been carefully reviewed and it does not appear that petitioner included a statement to show that the delay in payment of the maintenance fee was unavoidable. Rather, the Office has merely received pages 1-3 of the form petition (PTO/SB/65).

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STATUTES, RULES AND REGULATIONS

35 U.S.C. § 41(c)(1) states that:

The Director may accept the delayed payment of any maintenance fee required ... after the six month grace period if the delay is shown to the satisfaction of the Director to have been unavoidable.

37 C.F.R. §1.378(b) provides that:

Any petition to accept an unavoidably delayed payment of a maintenance fee must include:

(1) The required maintenance fee set forth in §1.20(e) through (g);

(2) The surcharge set forth in §1.20(I)(1); and

(3) A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

Acceptance of a late maintenance fee under the unavoidable delay standard is considered under the same standard for reviving an abandoned application under 35 U.S.C. 133. Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business.

In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68

(D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). However, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

OPINION

Requirements (1) and (3) above are not met. Petitioner has failed to meet his burden of showing that the delay was unavoidable. Petitioner simply does not provide any showing to establish that the delay was "unavoidable."

Moreover, petitioner does not provide the required maintenance fees as set forth in §1.20(e) through (g). As this patent issued October 3, 2000, the period for payment of both the first and the second maintenance fees had expired when this petition was filed on December 9, 2008. Nonetheless, Petitioner, without explanation, only submitted the 3 ½ year maintenance fee.

CONCLUSION

For the reasons set forth above, it is concluded that petitioner has not met his burden of showing that the delay in paying the maintenance fee was unavoidable within the meaning of 35 U.S.C. § 41(c) and 37 CFR 1.378(b).

In view thereof, the petition is DISMISSED.

Any request for reconsideration of this decision must be filed within **TWO MONTHS** of the mailing date of this decision. Any such petition for reconsideration must be accompanied by the \$400 petition fee set forth in § 1.17(h). After decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Director. Accordingly, on request for reconsideration, it is extremely important the petitioner supply any and all relevant information and documentation in order to meet his burden of showing unavoidable delay.

If on request for reconsideration, the delayed payment of the maintenance fee is not accepted, then the maintenance fee and the surcharge set forth in §1.20(i) are subject to refund following the decision on the petition for reconsideration, or

after the expiration of the time for filing such a petition for reconsideration, if none is filed. (Petitioner may request a refund of the maintenance fee and surcharge by writing to the Office of Finance, Refund Section, Commissioner for Patents, Washington DC 20231. A copy of the last decision rendered should accompany the request for refund).

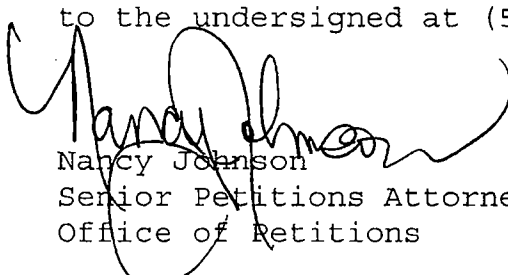
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